No. 92-588

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; and MISSISSIPPI WOMEN'S MEDICAL CENTER,

Petitioners,

—v.—

MIKE MOORE, as Attorney General of the State of Mississippi, and his employees, agents and successors,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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No. 92-588

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

HELEN B. BARNES, M.D., JOSEPH MITCHELL, M.D., JOSEPH BOOKER, M.D., on behalf of themselves, their patients, and all others similarly situated; NEW WOMAN MEDICAL CENTER, INC.; MISSISSIPPI WOMEN'S MEDICAL CLINIC,

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-v.-

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Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This supplemental brief is submitted in support of the Petition for a Writ of Certiorari previously filed with this Court. It seeks to update the Court on new developments, including a recent decision of the Court of Appeals for the Third Circuit that differs from that of the Fifth Circuit in its interpretation of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992).

In *Casey*, a plurality of this Court articulated a new standard for assessing the constitutionality of a statute

restricting abortion. *Id.* at 2821. This standard requires courts to determine whether such a statute "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2820. Reviewing the opinion of the lower court in *Casey*, this Court then "affirmed in part . . . [,] reversed in part and . . . remanded for proceedings consistent with . . . [its] opinion, including consideration of the question of severability." *Id.* at 2833.

Nearly one month after the Petition for a Writ of Certiorari was filed in this case, the Court of Appeals for the Third Circuit issued its decision on remand. *See Casey*, No. 90-1662 (3rd Cir. October 30, 1992).[1] The Third Circuit held that the Pennsylvania statutory provisions invalidated by this Court in *Casey* were severable under applicable legal standards. 11sa. In briefing the severability issue, however, plaintiffs in *Casey* stated their intention to ask the district court to reopen the record for "further factual findings related to . . . the 'new undue burden analysis.'" 11sa. In response, defendants asked for additional briefing, arguing that this Court's decision in *Casey* was a "final judgement" and that a remand permitting the record to be reopened would be "flatly inconsistent" with this judgement. *See* Appellants' Surreply Brief on Severability at 1 in *Casey*, No. 90-1662 (submitted September 15, 1992, but never filed).[2] Observing that the

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[1] The Third Circuit's decision on remand in *Casey* is reprinted and attached as a supplemental appendix. Citations to the Third Circuit decision will be to "__sa". Citations to the decision of the Court of Appeals for the Fifth Circuit will be to the appendix to the Petition for a Writ of Certiorari as "__a".

[2] The proposed surreply was filed with a Motion to Permit Surreply (continued...)

question of whether the record in *Casey* may be reopened was "not a matter for our court, at least at this time[,]" 11sa, the Third Circuit denied the request for additional briefing, amended its judgement and "remanded for such further proceedings as may be appropriate." *Id.*

The Third Circuit's mandate stands in contrast to that issued by the Fifth Circuit below. Concluding that this Court's decision in *Casey* rendered the Mississippi statute at issue here constitutional as a matter of law, 7a, the Fifth Circuit in the instant case barred any and all further proceedings by remanding to the district court only "for entry of an order of dismissal." *Id.* Indeed, after a Motion for Stay of Mandate and Injunction Pending Review of Petition for Writ of Certiorari was denied by the court of appeals, 12sa, the district court had no choice but to dismiss this case, *see* 13sa,[3] although the factual record had been "truncated," 14a, no factual findings had been made, *see generally* 8a-14a, and no analysis under an "undue burden" standard had been entertained, *see* 12a.

A comparison of the mandates of these two courts of appeals reveals divergent understandings of the constitutional analysis employed by this Court in *Casey*. In plain terms, the Fifth and Third Circuits appear to differ on the question of whether litigants mounting a facial

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[2] (...continued)
Brief on Severability (filed September 15, 1992), which Motion was denied by the Third Circuit in an Order dated October 30, 1992. 14sa.

[3] Noting that the Fifth Circuit had "directed that the cause be dismissed [,]" the district court "fully and finally dismissed" the case in an Order dated September 30, 1992. 13sa. The Order was not received by petitioners until after the Petition for a Writ of Certiorari was filed in this Court on October 2, 1992.

challenge to a restrictive abortion law after *Casey* may be precluded from developing a factual record on whether the statute imposes an "undue burden" on a woman's constitutionally protected choice to terminate pregnancy. At the very least, these two courts appear to differ on whether this Court's decision in *Casey* requires denial of a request to reopen a factual record on remand as a matter of law or whether such a request should be decided in the discretion of the district court familiar with the record in the first instance.

A decision on this issue by the court most familiar with the record would permit a careful assessment of the thoroughness of any factual record previously developed and of its applicability to a constitutional determination under the new "undue burden" standard. It would also permit consideration of offers of proof regarding the nature, relevance, and importance of any additional evidentiary proceedings. In sum, remand to the district court would minimize the likelihood that burdens of constitutional magnitude could be imposed on women -- as petitioners assert they have in this case -- prior to consideration of a statute's constitutionality under currently applicable legal standards. *See* Petition for a Writ of Certiorari at 8-9 (citing declarations at 22a-40a).

Respectfully submitted,

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Dated: November 22, 1992

SUPPLEMENTAL APPENDIX

Filed October 30, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1662

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA REPRODUCTIVE HEALTH AND COUNSELING CENTER
WOMEN'S HEALTH SERVICES, INC.,
WOMEN'S SUBURBAN CLINIC,
ALLENTOWN WOMEN'S CENTER,
ALLEN, THOMAS, M.D., on behalf of himself and all others similarly situated

v.

CASEY, ROBERT P., RICHARDS, N. MARK, PREATE, ERNEST, personally and in their official capacities, and MARINO, MICHAEL D., personally and in his official capacity, together with all others similarly situated.

Robert P. Casey, N. Mark Richards and Ernest D. Preate, Jr.,

Appellants.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 88-3228)
Remand from the Supreme Court
of the United States
Nos. 91-902 and 91-744

Submitted under Third Circuit Rule 12(6)
September 25, 1992

Before: Stapleton, Alito and Seitz, *Circuit Judges*.

(Filed: October 30, 1992)

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National Woman Abuse Prevention Project

Domestic Violence Research and Resources
Connecticut Coalition Against Domestic Violence
Clinton County Women's Center
Hospitality House Services for Women, Inc.
Laurel House
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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

The Supreme Court of the United States upheld, with

two exceptions, the constitutionality of certain provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203-3220 (1990) (the "Act"). *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). It, in substance, affirmed our earlier judgment in this matter. *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991).

In its implementing mandate the Court first stated that the judgment in No. 91-902 "is affirmed." The petition for certiorari in that case had been filed by defendants-appellants, Casey, et al. (No. 91-902) (the "Commonwealth") attacking the judgment of this court to the extent that it had affirmed the district court's judgment that § 3209 of the Act (spousal notice) was unconstitutional. Since the judgment of our court was affirmed unconditionally on that claim, it is not of further relevance at this point.

In the second part of its mandate the Court stated:

> The judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion, including consideration of the questions of severability.

Thus, the judgment in No. 91-744 affirmed this court's rejection of the constitutional attacks mounted by the plaintiffs ("Clinics") on several portions of the Act. However, the Court reversed our judgment in part. We interpret that portion of the mandate to be based on the fact that we did not go on to declare the related subsection 14(a)(12) of § 3214 (report to Department of Health showing spousal notice) unconstitutional. Pursuant to the Court's mandate, we will therefore amend our judgment to include a provision also invalidating subsection 14(a)(12) of § 3214 of the Act.

We turn now to the portion of the mandate directing us

to consider the question of the severability of the balance of the Act from the two provisions declared unconstitutional.

The first provision declared unconstitutional by the Court is § 3209, entitled "Spousal Notice." It reads in pertinent part as follows:

> (a) Spousal notice required. - In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion
> . . . .

The second, and related, provision declared unconstitutional is subsection 14(a)(12) of § 3214. It required a report of all abortions to the Department of Health containing, *inter alia*, the following information:

> (12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her spouse was given, the report shall also indicate the reason for failure to provide notice.

We are met at the threshold with the Commonwealth's contention that the Clinics waived their rights to attack the severability of § 3209 because they did not ask the Supreme Court to review this courts ruling in footnote 27, holding that § 3209 was severable. *Planned Parenthood v. Casey*,

947 F.2d at 715. In the present circumstances we do not decide whether the waiver argument has merit. We so conclude because, very simply, our relative position in the federal judicial hierarchy does not permit us to ignore the Supreme Court's mandate directing us to consider the severability question and we construe that mandate to mean that we should consider that question on its merits. We turn to that task.

The resolution of the severability of the two provisions from the balance of the Act is controlled by state law, in this case, Pennsylvania law. *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 818 (1989). Thus, we must predict whether the Supreme Court of Pennsylvania would sever the unconstitutional provisions and uphold the continuing legal validity of the balance of the Act.

The Abortion Act itself contains the following severability provision:

> The provisions of this act are severable. If any word, phrase or provision of this act or its application to any person or circumstances is held invalid, the invalidity shall not affect any other word, phrase or provision or application of this act which can be given effect without the invalid word, phrase, provisions or application. Act of November 17, 1989, 1989 Pa. Laws 592, No. 64, § 6.

In addition, Pennsylvania has a general severability statute that reads:

> The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or

> circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. 1 Pa. Const. Stat. Ann. § 1925 (Supp. 1991).

It is evident even from a casual reading of each statue that there is a clearly expressed legislative preference to retain the viability of the legal portions of a statute, if reasonably possible. *See Commonwealth, Dep't of Educ. v. First School*, 370 A.2d 702, 705 (Pa. 1977). Against that background, we look to the governing principles set forth in *Saulsbury v. Bethlehem Steel Co.*, 196 A.2d 664, 666 (Pa. 1964):

> [A] statute or ordinance may be partially valid and partially invalid, and . . . if the provisions are distinct and not so interwoven as to be inseparable . . . courts should sustain the valid portions.

To apply the quoted principles, we first ask whether § 3209 and subsection 14(a)(12) of § 3214 are "distinct" from the balance of the Act. Certainly, the invalid provisions of the Act are, as a facial matter, physically distinct from the rest of the Act. Indeed, they did not even appear until the 1989 amendments to the Act. But, even if "distinct" can be said to have a more pervasive application, our view is unaltered. We say this because the subject matter of the invalid sections stands apart in its function from the core provisions of the entire Act. The core provisions are

designed to require that an abortion decision by a woman be based on stipulated information and be made after an assured time to reflect about such a decision. They also impose procedural limitations on the rights of minors to obtain an abortion.

The second question we must answer under Pennsylvania law is whether the invalid provisions are realistically so interwoven with the valid provisions as to be inseparable. The answer to this question obviously may be quite similar to the first. In any event, we think it requires us to juxtapose the valid and invalid provisions and ask whether the valid provisions are functional without the two invalid provisions.

The first invalid provision requires a physician performing an abortion to have, with certain exceptions, a signed statement from the woman involved that she has notified her spouse that she is about to undergo an abortion. The related provision, subsection 14(a)(12) of § 3214, requires that the report to the Department of Health recite that spousal notice was given.

We do not believe that the omission of these requirements would justify, in a meaningful sense, a conclusion that the General Assembly would not have enacted the other provisions of the Act had it known these particular provisions would be invalidated. The basic statutory scheme remains intact and can operate independently of the unconstitutional sections.

The Clinics contend, however, that the invalid provisions are the "centerpiece" of the Act. They argue that the legislative debates demonstrate how deeply many of the legislators favored the inclusion of the spousal notice provisions. The first difficulty with this argument is that such individual comments are not admissible as evidence of legislative intent under Pennsylvania law. *Commonwealth v. Alcoa Properties, Inc.*, 269 A.2d 748 (Pa. 1970); see *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util.*

Comm'n, 837 F.2d 600, 616 (3d Cir. 1980). Furthermore, the intensity of views of individual legislators during the debate with respect to later-declared invalid provisions, standing alone, sheds little light on their intentions in the absence of such provision.

We predict that under the controlling Pennsylvania law the Pennsylvania Supreme Court would hold the invalid provisions severable from the balance of the Act. We adopt the same position.

Finally, as a footnote in their brief on severability, the Clinics assert, as an aside, that they will request the district court to open the record and make further factual findings related to both the "new undue burden analysis" adopted by the Supreme Court, as well as the "preparedness of the Commonwealth to implement the Act." The Commonwealth sought leave to respond. We deny that request because it is not a matter for our court, at least at this time. Our function under the Supreme Court mandate is to decide what we have been directed to decide and to reflect our decision in the modified judgment.

Pursuant to the Supreme Court's mandate, our judgment will be amended to invalidate subsection 14(a)(12) of § 3214 of the Act, and the judgment as amended will constitute the judgment of the court. The matter will be remanded for such further proceedings as may be appropriate.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1953

HELEN B. BARNES, M.D.,
ET AL.,

Plaintiffs-Appellees,

versus

MIKE MOORE, Attorney General
of the State of Mississippi
and his employees, agents
and successors,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi

Before REYNALDO G. GARZA, DAVIS AND BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion for stay of the mandate pending the filing of a petition for writ of certiorari with the Supreme Court is DENIED.

IT IS FURTHER ORDERED that appellees' motion for injunction pending review of a petition for writ of certiorari by the United States Supreme Court is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN B. BARNES, M.D.; JOSEPH MITCHELL, M.D.; JOSEPH BOOKER, M.D., ON BEHALF OF THEMSELVES, THEIR PATIENTS AND ALL OTHERS SIMILARLY SITUATED; NEW WOMAN MEDICAL CENTER, INC.; MISSISSIPPI WOMEN'S MEDICAL CENTER

PLAINTIFFS

v. CIVIL ACTION NO. J91-0245(W)

MIKE MOORE, AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI AND HIS EMPLOYEES, AGENTS AND SUCCESSORS

DEFENDANT

ORDER OF DISMISSAL

The above styled and numbered cause has been remanded to this court by the United States Court of Appeals for the Fifth Circuit wherein the Fifth Circuit vacated this court's preliminary injunction and directed that the cause be dismissed. Therefore, the above styled and numbered cause is hereby fully and finally dismissed.

SO ORDERED this the 30th day of September, 1992.

Henry T. Wingate /S/
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1662

Re: PLANNED PARENTHOOD vs. CASEY

Present: STAPLETON, ALITO and SEITZ, Circuit Judges

1. Appellants' Motion To Permit Surreply Brief on Severability, together with copy of Appellants' Surreply Brief on Severability, (not filed unless the Court directs)

2. Any answer in response to this motion due September 25, 1992 will be forwarded to you upon receipt of same.

Barbara Jacobson /s/
Deputy Clerk - Direct Dial 597-8465

ORDER

The foregoing Motion is/ denied

By the Court,

Seitz /s/
Circuit Judge

Dated: OCT 30 1992